

## **Sick Leave and Vacation Pay May Not Be Substituted for Unpaid FMLA Leave While an Employee is Receiving Benefits From Disability Insurance or Workers' Compensation**

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In general, the Family Medical Leave Act ("FMLA") allows employers to require employees to substitute accrued vacation, sick, or other paid leave for all or part of their unpaid FMLA-qualifying leave. 29 CFR § 825.207. Many employers choose to do this in order to avoid long absences caused by "stacking" of FMLA leave on top of other types of leave. However, if an employee who requests FMLA leave for a serious health condition also qualifies for paid benefits such as workers' compensation or disability insurance, this provision may be inapplicable.

Because workers' compensation and disability insurance typically provide an employee on leave with compensation, the federal regulations state that such leave is not "unpaid" leave and, therefore, an employer cannot require an employee to substitute accrued paid leave for unpaid FMLA leave. 29 CFR §§ 825.207(d) and (e). The employer may still designate such workers' compensation or disability leave as FMLA leave for purposes of future FMLA leave eligibility.

Additionally, the revised FMLA regulations, effective January 16, 2009, allow an employee to use sick or vacation pay to *supplement* their workers' compensation or disability insurance benefits. 29 CFR §§ 825.207(d) and (e). Under the new regulations, an employer and employee may agree, where state law permits, to have paid leave supplement these benefits.

In light of these regulations, employers must find out whether an employee is receiving workers' compensation or disability insurance payments before requiring the employee to substitute accrued paid leave for part of their FMLA-qualifying leave. Employers are therefore advised to contact their workers' compensation carrier to determine whether an employee has been paid benefits while on FMLA leave. With respect to disability insurance plans, the employer should be sure to ask employees whether they are receiving disability insurance benefits before requiring that their paid leave be substituted for unpaid FMLA leave.

Finally, employers' personnel policies concerning the substitution of paid leave for unpaid FMLA leave should be consistent with the FMLA regulations discussed above. Accordingly, employers who have policies requiring employees to use accrued paid leave for part or all of their unpaid FMLA-qualifying leave may consider adding the following sample language to the FMLA policies in their handbooks:

**"Notwithstanding the language above, if an employee is receiving benefit payments from a disability insurance plan or workers' compensation, then accrued paid leave will not be substituted for unpaid FMLA leave, except to supplement such benefits under certain circumstances by mutual agreement between the employee and the Company."**

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